Supreme Court, U.S.
FILED
FEB 22 2002
CLERK

(4)

No. 01-997

IN THE

Supreme Court of the United States

ANN MARK,

Petitioner,

v.

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, NEW YORK STATE RETIREMENT FUND and NEW YORK CITY PENSION FUNDS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

KENNETH A. ELAN
LAW OFFICES OF KENNETH A. ELAN
217 Broadway - Suite 606
New York, NY 10007
(212) 619-0261

JOSEPH P. GARLAND
KLEIN & SOLOMON, LLP
275 Madison Avenue, 11th Floor
New York, NY 10016
(212) 661-9400

JOHN HALEBIAN
SAMUEL K. ROSEN*
FREDERICK W. GERKENS, III
WECHSLER HARWOOD
HALEBIAN & FEFFER LLP
488 Madison Avenue
New York, NY 10022
(212) 935-7400

Attorneys for Petitioner

* *Counsel of Record*

172491

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

14 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Summary of Argument	1
Argument	4
I. Respondents' Focus On The Court Of Appeals Analysis Of The Differences Between Section 11 And 10(b) Claims Is Misplaced	4
II. The Court of Appeals Bases for Distinguishing the *PRIDES* and *YEAGER* Actions are Erroneous	6
A. The *PRIDES* Action	6
B. The *YEAGER* Action	9
III. Respondents' Authority Regarding The Representation Of Multiple Claims Is Inapplicable	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Amchem Prods. v. Windsor, 521 U.S. 591 (1997) . . . 1, 9, 10

In re Cendant Corp. PRIDES Litig., 51 F. Supp. 2d 537 (D. N.J. 1999), *aff'd in part, rev'd in part*, 235 F.3d 1786 (3d Cir. 2000), *cert. denied*, 122 S. Ct. 202 (2001) ..... *passim*

Statutes:

15 U.S.C. § 77k ..... *passim*

15 U.S.C. § 77z-1(a) 9

15 U.S.C. § 78j(b) ..... *passim*

15 U.S.C. § 78u-4 ..... 3, 9

Rule:

Fed. R. Civ. P. 23 1

SUMMARY OF ARGUMENT

By only the fourth word on the first page of Respondents' Brief[1] (i.e., the Counter-Statement of the Question Presented) Lead Plaintiffs/respondents ("respondents") make it abundantly clear that they still "don't get it." In characterizing this action as a "securities *fraud* class action" on the first page of their brief (emphasis added) and repeatedly throughout the brief, respondents only emphasize the conflict and difficulty of adequately representing the interests of one group of class members with only *fraud* claims and another group of class members with *strict liability* claims.

This case presents the Court with the opportunity to apply its teaching with respect to the obligations of lower courts under Rule 23 of the Federal Rules of Civil Procedure to insure that the interests of class members with diverse claims are protected in federal securities class actions. It presents a set of facts that in the end, exposes the cost to class members, with distinct securities claims, of a district court's failure either at the outset or at the conclusion of an action to acknowledge and establish "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem Prods. v. Windsor*, 521 U.S. 591, 627 (1997).

The gravamen of the court of appeals' affirmance of the plan of allocation (the "Plan") — that "the basis for measuring the different legal strengths of the claims involved is too speculative" (Pet. App. 6a)[2] — is flatly contradicted by the factual record below. This unusually *fact-rich* environment demonstrates beyond doubt that class members with strict liability claims under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k (the "Section 11 Claimants") should have received a materially greater amount of the settlement funds than they did under the approved allocation. The extensive

1. Further references to the Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit are cited as "Resp. Br., at __"

2. References to the Appendix are cited as "Pet. App. __."

factual record here is a virtue, not the vice euphemistically described by respondents as "highly fact intensive and case-specific" (Resp. Br., at 1) or "highly fact-specific, record dependent." (Resp. Br., at 15). To the contrary, the facts here serve to highlight the inadequacies to Section 11 Claimants resulting from a conflicted lead plaintiff in a securities class action. At least three simple facts make it clear that the Plan[3] should have provided greater compensation for Section 11 Claimants as compared to Section 10(b) Claimants, class members with only fraud claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

First, class members with Section 11 claims could obtain immediate summary judgment on liability *and* between 75%, *Yeager v. Cendant Corp.*, Pet. App. 241a-263a (*"YEAGER"*) to 100%, *In re Cendant Corp. PRIDES Litig.*, 51 F. Supp. 2d 537 (D. N.J. 1999), *aff'd in part, rev'd in part*, 235 F.3d 1786 (3d Cir. 2000), *cert. denied*, 122 S. Ct. 202 (2001) (*"PRIDES"*) of claimed damages. The *PRIDES* action, the *YEAGER* action, and the underlying legal and factual record show that fact. Second, class members with only Section 10(b) claims were not entitled to immediate relief on any issue and, in the absence of a settlement, looked forward to years of discovery, trial, and the risk of proportionate liability. Third, class members with Section 11 claims who had separate counsel, i.e. the *PRIDES* class and the *YEAGER* plaintiffs, did in fact, achieve substantially greater monetary results than did those represented by respondents. And the *PRIDES* class and the *YEAGER* plaintiffs were not required to defer the assertion of *their* rights

3. Respondents have regularly complained (Resp. Br. at 16) that petitioner never proposed an alternative plan of allocation as if failing to do so constituted some flaw in her argument. Unlike respondents, petitioner has never presumed to be able to unilaterally impose a plan that adversely impacts interests that conflict with her own. And if it has not been obvious in petitioner's papers in the district court, the court of appeals and this Court, certainly her preferred plan would provide for a 100% recovery of damages to Section 11 Claimants with the remainder to Section 10(b) Claimants.

for several years while Section 10(b) claims were pursued by others. The conclusion of the court of appeals that these types of differences were not significant is clearly wrong. And the comparisons being made by respondents and the courts below between the relative sizes of the settlement in the *PRIDES* action ($341.5 million) and claim in the *YEAGER* action ($15.85 million), as compared to the settlement in the Cendant action ($3.2 billion), as an excuse for why the normal rules of analysis should not apply, seem to suggest that typical conflicts of interest and the entitlement of absent class members to due process should be primarily determined by how much money is at stake, an idea that is antithetical to the concept of due process itself.

The Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4, can cause district courts, lead plaintiffs and their counsel, to become trapped in an untenable Catch-22. The PSLRA strongly encourages district courts to appoint the single party with the largest financial loss as lead plaintiff. Thus, there is an inherent desire for the district court to deal with one class and one counsel. This approach, no matter how well-intentioned, means that once the litigation is underway and progresses to a proposed settlement, the lead plaintiff and its counsel cannot even consider a plan of allocation that provided for varying payments to different groups of class members. To do so would bring to light that a conflict likely existed from the outset of the litigation. Accordingly, the lead plaintiff and its counsel are incentivized to deny conflicts ever existed and to deny at least one distinct group of absent class members, with stronger claims than others, a fair plan of allocation.[4]

---

4. The need for this Court to address these allocation and conflicts issues at this time is also further demonstrated by the recent shareholder class action litigations spawned by alleged massive accounting frauds occurring over several years and touching different classes of investors and employees. Such alleged frauds might involve a wide array of different groups of defendants, including officers and directors, accountants and outside attorneys, and can involve conflicting and (Cont'd)

ARGUMENT

I. Respondents' Focus On The Court Of Appeals Analysis Of The Differences Between Section 11 And 10(b) Claims Is Misplaced

At the outset, the court of appeals analysis as to the differences between Section 11 and Section 10(b) claims, referred to and cited by respondents (Resp. Br., at 12-14), was flawed because it ignored or disregarded the most critical and obvious distinction between the two claims in the instant litigation, i.e. that Section 11 Claimants could obtain immediate summary judgment on liability and 75% of damages and Section 10(b) Claimants could not obtain summary judgment on anything. This distinction is not "too speculative" to measure. Cendant conceded Section 11 liability and 75% of claimed damages in the *YEAGER* action before the same district court that subsequently approved of the Cendant settlement. Thus, the district court knew, prior to its approval of the settlement and the Plan, that Section 11 liability and 75% of claimed damages was an absolute certainty.

First, the court of appeals mistakenly concluded that the difference in liability standards between Sections 11 and 10(b) "ultimately does not make a substantial difference in this case" (Pet. App. 73a) because Cendant's employees admitted fraud, so scienter for the Section 10(b) claims was admitted. The court of appeals even considered the risk of proportionate liability but dismissed it as too difficult for Cendant to assert as a defense. In coming to these erroneous conclusions, however, the court of appeals never focused on the fact that (i) Section 11 claims were entitled to immediate summary judgment on liability and for at least 75% of damages and Section 10(b) claims were not,

(Cont'd)
disparate claims. Despite the extended period over which these frauds occurred, the disparate interests of investors, the multiple defendants and the overall complexity of the litigation, courts often appoint a single lead plaintiff and a single lead counsel. This action provides this Court an opportunity to guide courts in choosing class representation and insuring an adequate plan of allocation.

and (ii) even though it was clear that Cendant employees committed fraud, (given the amount of finger pointing and denial among Cendant employees), the conclusion of the court of appeals that proving scienter entirely against Cendant was a foregone conclusion is not so clear.

Second, the court of appeals erroneously assumed that both Section 11 and Section 10(b) Claimants would have an equally difficult time in establishing damages. Pet. App. 74a. Here again, the court of appeals never considered the fact that (i) Section 11 claims were entitled to immediate summary judgment on liability and for at least 75% of claimed damages and Section 10(b) claims were not, and (ii) prosecution of the Section 11 damages claims did not require any discovery from defendants (other than their expert) and could have proceeded immediately to trial. On the other hand, establishing liability on the Section 10(b) claims would have taken years before the damage claims could have even been addressed.[5]

Finally, the court of appeals argument that Section 10(b) aggregate damages are generally greater than Section 11 aggregate damages and that this factor somehow makes Section 10(b) claims "potentially stronger" is also misplaced. Pet. App. 75a. The Section 10(b) damages that respondents calculated, $15.31 per share, were only 17% per share greater than the Section 11 damages calculated by respondents, or $13.06 per share. At the time that the lower court approved the Plan, Section 11 class members were looking at a 36% recovery

5. In its discussion of the difficulty of establishing damages cited by respondents' (Resp. Br. at. 20), the court of appeals stated that: "the informal discovery that Lead Plaintiff obtained in return for deferring the summary judgment motion produced information relevant to determining the Class's damages, which was beneficial to both the § 11 and § 10(b) claims." (Pet. App. 74a). There was no support in the record for this statement and there is otherwise no basis to believe that Cendant would have had any information relevant to Section 11 damages claims that was not publicly available. This comment by the court of appeals was sheer speculation and simply designed to explain away what was otherwise direct incontrovertible evidence of a sell out of the Section 11 claims by the respondents.

figure as compared to at least a 100% recovery in the *PRIDES* settlement and 75% recovery in the *YEAGER* action.

Even if it was relevant to the Court's analysis (which it is not), a potential 67% payout in hindsight, i.e. $10.25 per share, to Cendant class members resulting from the submission of fewer claims (before awarding legal fees and expenses) is still a far cry from the full recovery in the *PRIDES* action.[6] And 100% of the Section 11 per share damages, i.e. $13.06, is greater by more than 27%, than the $10.25 per share Section 10(b) recovery in the Cendant action.

Furthermore, simply because proving damages for Section 11 claims and Section 10(b) claims may arguably be equally complex, this fact, standing alone, is not compelling justification for ignoring the other vast distinctions between Sections 11 and 10(b) claims. Here again, the court of appeals never focused on the fact that (i) Section 11 claims were entitled to immediate summary judgment on liability and for at least 75% of damages and Section 10(b) claims were not, and (ii) prosecution of the Section 11 damages claims did not require any discovery from defendants (other than their expert) and could have proceeded immediately to trial.

II. The Court of Appeals Bases for Distinguishing the *PRIDES* and *YEAGER* Actions are Erroneous

A. The *PRIDES* Action

The court of appeals attempt to distinguish the *PRIDES* settlement, which in fact provided all class members with a nearly 100% cash equivalent recovery of damages, from the Cendant settlement, is flawed. Pet. App. 75a-77a. At the outset, it completely ignored and flatly contradicted the district court's holding in approving the *PRIDES* settlement that: "The class is completely made whole by such compensation."

The court of appeals, using 20-20 hindsight, observed in connection with the "paper payout" in the *PRIDES* settlement that:

---

6. It is axiomatic that assessment of the fairness of an allocation plan should be at the time of adoption, not in hindsight.

> There was about a nine-month delay between the settlement approval and the date when the class members could sell their new shares in the market, and much could have happened to Cendant and its stock during that interim that could have affected the amount of return that the *PRIDES* plaintiffs received. Thus, the *PRIDES* "paper for paper" exchange involved a sizeable risk, at the time the settlement was entered into, of a payout substantially less than 100% of the class's damages.

Footnote 29 at Pet. App. 76a.

First, the *PRIDES* settlement (which provided *PRIDES* class members with additional securities) was initially valued at 110% more than the high end of the range of likely recovery for the Section 11 claims, i.e. 300% more than the 36% recovery provided for Cendant class members at the time the Cendant settlement was approved. As the *PRIDES* class notice stated:

> The potential recovery by the Class in respect of their Securities Act of 1933 claims has been estimated by experts retained by lead counsel for the Class to fall within a range of $268,125,000 to $313,950,000 or $9.19 to $10.77 per *PRIDES*. In lead counsel's view, the proposed settlement payment, based on the aggregate theoretical value of the Rights (approximately $341.5 million), thus exceeds the likely recovery by the Class in respect of its Securities Act of 1933 claims that extended litigation could yield if fully successful. In lead counsel's view, this premium recognizes that the Rights may trade in the market at a price below their theoretical value.

(*PRIDES* Settlement Notice, page 1). Accordingly, the risk that the securities might be worth less at the time that they could be sold by class members was already factored into the settlement.[7]

7. Of course, it almost goes without saying that the value of the securities issued in settlement could also have *increased*.

Second, respondents and the lower courts also pointed out that because *PRIDES* was a "claims made" settlement it did not compare favorably to the Cendant settlement (Resp. Br. at 21) (Pet. App. 75a-77a). However, a 100% cash equivalent recovery in a securities class action, after the payment of attorneys fees and expenses, even with funds reverting to defendants, is still a 100% cash equivalent recovery. *PRIDES* was not some lightly contested nuisance value settlement. And paper or not, the cash proposed to be paid to the Section 11 Claimants in the Cendant action still does not come close to the recovery achieved in the *PRIDES* action. Accordingly, the court of appeals analysis that the *PRIDES* 100% recovery was not really a 100% recovery seems like the court of appeals was just trying too hard to distinguish the *PRIDES* settlement.

Lastly, the admission of the court of appeals that "much could have happened to Cendant and its stock during that interim" and that there was a "sizeable risk" (footnote 29 at Pet. App. 76a) of a lower payout with the passage of time is a risk factor that could have adversely affected Section 11 Claimants in the Cendant action. In fact, "much could have happened" to the ability of the Section 11 Claimants to recover any damages. Cendant could have gone bankrupt while the Section 10(b) Claimants took years to prosecute their claims, and the Section 11 Claimants would have recovered nothing. The Section 11 Claimants, had they been represented by a separate lead plaintiff and lead counsel, could have obtained immediate summary judgment on liability and for the vast majority of damages, at the expense of the Section 10(b) Claimants. To require Section 11 Claimants to wait months or years while the Section 10(b) claims required extensive document and deposition discovery, clearly demonstrates (i) the egregious conflicts below, (ii) why the Section 11 claims were so much more valuable than the Section 10(b) claims, and (iii) why the Plan should have provided for an enhanced recovery for the Section 11 claims.

B. The *YEAGER* Action

The court of appeals' bases for distinguishing *YEAGER* were simply wrong. The fact that *YEAGER* was not a class action is irrelevant. The only amendments to the Exchange Act by the PSLRA that are not applicable to private actions are the subsections regarding the appointment of lead plaintiff. 15 U.S.C. § 78u-4(a); 15 U.S.C. § 77z-1(a). All other amendments, e.g., enhanced pleading requirements, the proof of loss causation, etc., are applicable to individual claimants under both the Exchange Act and the Securities Act.[8]

In addition, although the district court did not grant the *Yeagers'* damages claim in its entirety, it did grant approximately 75% of the damages as undisputed by Cendant. Moreover, petitioner has also learned that the district court's docket reflects that in November, 2001, the *YEAGER* action was dismissed with prejudice. Petitioner also learned that the dismissal was pursuant to a confidential settlement agreement. While we cannot be certain of the amount, it is patently clear that additional material consideration must have passed from Cendant to the Yeager plaintiffs to induce them to dismiss their action with prejudice. These facts further demonstrate that the immediate settlement value of the Section 11 claims materially exceeded the amount provided by the Plan.

III. Respondents' Authority Regarding The Representation Of Multiple Claims Is Inapplicable

Aside from the fact that the court of appeals failed to cite a single authority against petitioner in affirming the district court's denial of petitioner's objection, respondents themselves fail to cite a single authority on point contrary to petitioner's legal and factual arguments. Moreover, a closer examination of this Court's *Amchem* decision, which originated in the Third Circuit, demonstrates that *Amchem* is more similar to the issues here than recognized below. None of the other case law cited by

8. Further, the amount of damages sought by the Yeagers, $15.8 million, and the amount actually awarded on the motion for summary judgment, $11.6 million, involved amounts that are larger than what is recovered in many class actions.

respondents (Resp. Br. at. 24-25) involved the unusually strong and extensive set of facts that exist here or any facts for that matter that remotely resemble the litigation here. Accordingly, none of the case law cited by respondents is any impediment to this Court's grant of certiorari and reversal of the court of appeals.

Putting aside respondents' attempts to limit the applicability of *Amchem* to pre-packaged class action settlements, there is a striking similarity between the Section 11 and Section 10(b) Claimants in the instant litigation and the currently-injured claimants and exposure only or future claimants in *Amchem*. Like the currently-injured claimants in *Amchem*, who had a present injury and were immediately entitled to sue for damages, the Section 11 Claimants were entitled to immediate summary judgment on liability and at least 75% of their damages. And like the future claimants in *Amchem* who were not entitled to immediate relief but were possibly or likely to be entitled to such relief in the future, the Section 10(b) Claimants similarly, were not entitled to immediate relief and would likely have to wait through years of extensive discovery, trial and the risk of proportionate liability.

Moreover, the facts here make an even stronger argument that the interests of the Section 11 Claimants as compared to the interests and the Section 10(b) Claimants are even more disparate than the interests of the currently-injured and futures claimants in *Amchem*. Whereas the Section 11 Claimants here were immediately entitled to summary judgment and damages, the currently-injured claimants in *Amchem* had no immediate or even subsequent absolute right to anything. And like the futures claimants in *Amchem*, the Section 10(b) Claimants, in the absence of a quick settlement, were looking at several years of litigation and several significant risk factors.

CONCLUSION

The Court should grant the Petition for Certiorari.

Respectfully submitted,

KENNETH A. ELAN
LAW OFFICES OF KENNETH A. ELAN
217 Broadway - Suite 606
New York, NY 10007
(212) 619-0261

JOSEPH P. GARLAND
KLEIN & SOLOMON, LLP
275 Madison Avenue, 11th Floor
New York, NY 10016
(212) 661-9400

JOHN HALEBIAN
SAMUEL K. ROSEN*
FREDERICK W. GERKENS, III
WECHSLER HARWOOD
HALEBIAN & FEFFER LLP
488 Madison Avenue
New York, NY 10022
(212) 935-7400

Attorneys for Petitioner

* *Counsel of Record*